SUPREME COURT, U. S.

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No. 196

In the Supreme Court of the United States

OCTOBER TERM, 1968

DONALD DE SIMONE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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After a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted of aiding and abetting embezzlement from a federally insured bank, in violation of 18 U.S.C. 656 (two counts), and conspiracy to commit that offense. He was sentenced to concurrent terms of five years' imprisonment on each count (R. 393–396, 440). The court of appeals affirmed from the bench on April 26, 1968. A petition for rehearing was denied on May 14, 1968. The petition for a writ of certiorari, filed on June 14, 1968, is out of time under Rule 22–2 of the Rules of this Court. In all events, there is no occasion for further review.

Petitioner filed a pre-trial motion to suppress evidence which alleged, *inter alia,* that he was arrested

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on April 6, 1965, as he was walking from an automobile parked at the corner of Avenue A and Fourteenth Street in the Borough of Manhattan; that the automobile was occupied by Louis Di Maggio, whose nephew was the owner thereof; and that certain checks, various indicia of identification, and a typewriter were thereafter seized in a search of the automobile (R. 408–413). The government in opposition pointed out that petitioner had alleged no interest in the property seized nor a sufficient interest in the premises to confer standing (R. 415–416). The court denied the motion without hearing.

The evidence at trial showed that in March 1965 petitioner approached co-defendant Reno, a pickup and delivery clerk at the Chase Manhattan Bank, and suggested that Reno secure indorsed but uncancelled checks and turn them over to petitioner. Petitioner said that the checks should be in substantial amounts, payable to a woman. He said that he knew a woman who could duplicate the indorsements and cash the checks with identification that he would furnish (R. 15–16, 32, 58–65). Reno thereafter delivered to petitioner a check in the amount of $998.24, payable to a Harriet W. Penkalo. Petitioner introduced Reno to co-defendant Wharmby, who practiced copying the indorsement on the check (R. 66–75). Later, petitioner gave Miss Wharmby what appeared to be a New York driver's license in the name of Harriet W. Penkalo. Miss Wharmby took the check and the license to a New York bank and then rejoined petitioner and Reno with the proceeds of the check. After petitioner took fifty dollars, which he said was the cost of obtaining the driver's license, the money was divided (R.

76–81). Similar procedures were followed as to other checks which Reno secured from the bank (R. 38–48, 85–90, 185–189). About April 5, 1965, petitioner told Reno that he knew a man who could duplicate indorsements and that checks payable to a man would also be acceptable (R. 95).

Reno was arrested on April 6, 1965, and admitted his part in the scheme. On the following morning, pursuant to a previous arrangement, Reno met petitioner at Avenue A and Fourteenth Street, under the surveillance of four FBI agents. When petitioner attempted to give Reno a manila envelope, Reno told him not to give it to him in the street, and the two men entered an automobile parked nearby (R. 98–99, 184–194).

At this point in the evidence, petitioner renewed his motion to suppress and requested a hearing outside the presence of the jury. When petitioner's counsel stated that he had no additional facts to offer, the court denied the request (R. 195–199).

The circumstances of the arrest and search were then developed before the jury. FBI agent Goss testified that after observing petitioner meet Reno and tender the manila envelope, and after both men entered the parked automobile, he walked over to the car and saw petitioner place a manila envelope on the seat. Goss placed petitioner under arrest and seized the envelope. It contained a check payable to a Joseph MacLennon, a driver's license purportedly issued to the same individual, and several blank New York State registration cards (R. 190–193, 201–204). A typewriter equipped with a blue ribbon was also seized (R. 295–296). The license was a counterfeit and

apparently had been filled out on the seized typewriter (R. 246–249, 295–296).

1. The district court properly denied petitioner's pre-trial motion without a hearing because it failed to state facts showing that he was a "person aggrieved" within the meaning of Rule 41(e), F.R. Crim. P. The motion did not allege that petitioner had any interest in the property seized or in the vehicle searched, or that he even was an occupant of the car. Instead, the motion alleged that petitioner was outside the car, and that a Mr. Di Maggio, an uncle of the owner of the car, was its sole occupant. Since the prosecution was not based upon the possession of the items seized, there was no showing that petitioner had any standing to object to the search. *Jones* v. *United States,* 362 U.S. 257, 261–265; *Wong Sun* v. *United States,* 371 U.S. 471, 492; *Rios* v. *United States,* 364 U.S. 253, 255; *Hatch* v. *Reardon,* 204 U.S. 152, 160; *United States* v. *Bozza,* 365 F. 2d 206, 222–223 (C.A. 2); *Diaz-Rosendo* v. *United States,* 357 F. 2d 124, 131–132 (C.A. 9), certiorari denied, 385 U.S. 856.

2. At trial, there was no occasion to conduct a voir dire out of the hearing of the jury, since petitioner's counsel stated that he had no additional facts to submit to the court (*supra,* p. 3). When the circumstances of the arrest were presented to the jury, it appeared, contrary to petitioner's pretrial motion, that he was seated in the automobile and that the search was incident to petitioner's arrest, which was based upon probable cause. Reno's statement to the FBI, implicating petitioner in the scheme, was corroborated when petitioner appeared at the time and place indicated by Reno and when he attempted to

deliver the envelope to Reno, as Reno had advised the agents he would do. Such corroboration gave the agents ample ground for petitioner's immediate arrest without a warrant, and the search of the vehicle in which he was seated was reasonable. *Draper* v. *United States,* 358 U.S. 307.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

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